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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL ANTHONY, Plaintiff and Appellant, v. BERNARD MAZON et al., Defendants and Appellants.	G035734 (Super. Ct. No. 03CC09517) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed in part and reversed in part.

Bononi Law Group, Michael J. Bononi and Nicole K. Zaccheo for Defendants and Appellants.

Callahan & Blaine and Jim P. Mahacek for Plaintiff and Appellant.

* * *

This case is somewhat akin to deciding a dispute between Darth Vader[1] and the Borg,[2] or if you prefer a classical metaphor, Scylla and Charybdis.[3] There is no justice to be done here. The parties conspired in a despicable scheme to hide assets during marital dissolution and child support proceedings. The defendants retained those assets; the plaintiff sued to get them back. Both now rely on arguments relating to unclean hands, the sanctity of the judicial process, and public policy, all of which are laughable, considering the circumstances.

As much as we might prefer an outcome in which neither party profits from its wrongful conduct, it is not within our purview to do so. One of these undeserving parties, unfortunately, has to prevail.[4] For the reasons discussed below, we find the defendants' arguments without legal merit, except as to the punitive damage award. We therefore affirm the judgment except as to the punitive damage award, which is reversed.

I

FACTS

As of May 2001, Michael Anthony was the president and sole shareholder of Anthony & Morgan Insurance Services, Inc., (Anthony & Morgan) a surety company. His income from the business was substantial, at least several million dollars during 2000 and 2001. One of Anthony & Morgan's accounts was a Norwegian shipbuilding firm

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[1] See, e.g., Star Wars (20th Century Fox, Lucasfilm Ltd. 1977).

[2] See, e.g., Star Trek: First Contact (Paramount Pictures 1986); see also *Star Trek: The Next Generation* (Paramount Television 1987) ("Q Who," first broadcast May 6, 1989, and subsequent episodes.)

[3] Homer, Odyssey (c. 800-600 B.C.), Book XII.

[4] We do not confuse the morally dubious parties in this case with their counsel, who have zealously represented their respective clients' interests.

known as Kvaerner. Contract underwriter Andrew Sysyn worked with Anthony on the Kvaerner account to procure bonds for the firm.

In April 2001, Anthony hired Bernard Mazon (Mazon) as executive vice-president and chief operating officer of Anthony & Morgan. Mazon had been married to Anthony's sister, Jane,[5] for 35 years. His salary was $200,000 per year plus 17 percent of the company's bonus pool, and if the company was sold during his employment he would be entitled to 25 percent.

Anthony had been married to Cheri Anthony (Cheri) since 1994. They had two children. In 1999, the couple separated, but then reconciled, reaching a post-nuptial agreement they referred to as a post-marital separation/reconciliation agreement. Among other provisions, this agreement converted Anthony & Morgan from community property to Anthony's separate property for consideration of $100,000, given certain contingencies. The reconciliation lasted until 2001, when divorce proceedings were renewed.

Anthony formulated a strategy with Bernard and Jane Mazon (the Mazons) to shield his assets during the divorce. According to Anthony, he and the Mazons entered into an oral agreement whereby retained earnings (profits) from Anthony & Morgan would be paid to Mazon as "bonuses," which the Mazons would then return to Anthony after the divorce proceeding was finalized. From July to October 2001, approximately $3,686,325 was paid to the Mazons.

Further, Anthony and the Mazons agreed to dissolve Anthony & Morgan and sell certain assets to Mazon's newly formed company, Alliance Surety (Alliance), via an asset purchase agreement, in return for an oral promise from Alliance, Mazon and

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[5] Due to the family relationships and duplicated surnames, we refer to certain parties by their first names to minimize confusion and for the ease of the reader. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

Sysyn to pay Anthony one-third of the commissions from the Kvaerner account. There was also a sublease of office space and sale of office equipment. Alliance also agreed to employ Anthony as a consultant, paying him a $10,000 monthly fee for 10 years.

During the divorce proceedings, Anthony failed to disclose substantial amounts of income in court documents. On a November 2001 income and expense declaration, he stated that his salary, as of May 1, 2002, would be $10,000 per month. He also stated that his gross salary for the 2001 year was $300,000. He disclosed a "minimal" amount of money in his checking account, though he had $800,000 in cash in a safe at the home of Marcella McCrea, another sister. At his deposition in the divorce proceedings, Anthony testified that after July 2001 his salary was $10,000 per month and that he did not receive commissions or bonuses. During his testimony in this matter, Anthony characterized this testimony during the divorce proceeding as a "mistake."

The divorce was resolved by settlement between Cheri and Anthony in July 2002. Anthony then asked the Mazons to return the so-called "bonus" money and to pay him his one-third share of the Kvaerner account. The Mazons did not do so.

In 2003, Anthony filed an initial complaint against the Mazons and Alliance. Cheri filed a complaint in intervention. Shortly thereafter, Anthony settled with Cheri, agreeing to pay her $883 in child support for every $10,000 he recovered from the Mazons. Cheri also settled with the Mazons, among others, and subsequently dismissed her complaint.

In August 2004, Anthony filed a second amended complaint, also naming Sysyn as a defendant. The second amended complaint included claims for breach of contract, money had and received, constructive trust, accounting, fraud and conspiracy to defraud, and breach of the consulting contract.

The case went to trial before a jury in February 2005. During trial, Sysyn and Anthony settled and the case against Sysyn was dismissed. At the close of the

liability phase, the Mazons and Alliance (defendants) moved for nonsuit. The trial judge found that Anthony's actions during the divorce case were illegal and that both parties were morally at fault, but denied the motion.

The jury returned its special verdict on the liability phase, finding in Anthony's favor on all counts. The jury found there had been an oral contract between Anthony and the Mazons to hold money in trust until the divorce was finalized, which the Mazons breached. The jury also found that the Mazons had converted these funds and defrauded Anthony. Identical damages of $3,940,949.32 were awarded for each of these claims. The jury also found there was an oral contract between Anthony and Alliance and Anthony and Mazon to pay Anthony one-third of the Kvaerner commissions, and further, that Alliance and Mazon had defrauded Anthony regarding the commissions. Identical damages of $2,256,780.35 were awarded for each claim. The jury further found that Alliance breached the consulting agreement with Anthony, resulting in damages of $100,000. The total compensatory damages, therefore, were $6,197,724.67. The jury also made the requisite findings of malice, oppression and fraud necessary to continue to a punitive damages phase.

After the compensatory damages phase, the Mazons filed for bankruptcy in Florida.[6] The Mazons did not appear during the punitive damages phase. The jury awarded punitive damages of $7 million against Mazon, $2 million against Jane, and $1 million against Alliance.

Defendants' motion for new trial was denied. Judgment was entered on April 14, 2005. Defendants now appeal.

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[6] Apparently, Anthony obtained relief from the mandatory bankruptcy stay. The Mazons do not contest this point.

II

DISCUSSION

1. Recovery of Bonus Monies

Anthony sought to recover the bonus monies on three theories — breach of contract, fraud, and conversion. The jury found in Anthony's favor on all three theories, awarding identical damages of $3,940,949.32 on each cause of action. Defendants offer two theories why Anthony cannot recover the bonus monies. The first applies to all three causes of action; the second to the breach of contract claim only. We address each in turn.

A. Labor Code section 221

The Mazons claim that Labor Code section 221 (section 221) precludes Anthony from recovering the bonus monies on any theory. That section states: "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

In the context of this case, section 221 is an affirmative defense, but it was not raised in the answer, nor, as far as we can tell, was the answer ever amended to include it. It was raised only twice below — once in the guise of a motion in limine, and once in defendants' motion for new trial. It does not appear that jury instructions were requested relating to section 221, nor did defendants present any evidence to the jury on this theory.

Addressing the issue only in the context of a motion in limine and a motion for new trial assumes it can be addressed as a matter of law and presents no factual questions for the jury to decide. Setting aside defendants' failure to raise it in their answer, we will review the issue as a question of law.

We find the court did not err in determining that section 221 does not apply to this case. Simply put, it applies only to "wages." (§ 221.) Labor Code section 200,

subdivision (a) provides the following definition: "'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." The amounts in dispute here are not "wages" as defined by the Labor Code because, according to facts not in dispute, those funds were not "amounts for labor." They were funds pursuant to a side agreement irrelevant to Mazon's employment with Anthony & Morgan. The fact that the funds were disbursed through payroll does not turn those funds into "wages."

Moreover, section 221 is rooted in public policy and implicitly recognizes the imbalance of power between employers and employees. (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 327.) "Section 221 and related provisions in sections 222 through 223 were enacted in 1937 in response to secret deductions or 'kickbacks' that made it appear as if an employer was paying wages in accordance with an applicable contract or statute, whereas, in fact, the employer was paying less. [Citation.]" (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App. 4th 1109, 1118.) Section 221 also protects employees by preventing employers from docking workers for losses arising from simple negligence. (*Kerr's Catering Service v. Department of Industrial Relations, supra,* 57 Cal.2d at p. 330.) None of the policy concerns underlying section 221 come anywhere close to arising in this case.

Thus, we find the trial court did not err in holding that section 221 does not apply to this case. As a matter of law, the undisputed facts here demonstrate that the funds in question are not "wages" within the meaning of the statute, nor do the circumstances support the public policies the statute was designed to further. To the

extent any disputed factual issues are implicated, defendants waived those issues by not presenting evidence relevant to this defense to the jury.[7]

B. Breach of Contract

Defendants argue that Anthony cannot recover the bonus monies under a breach of contract theory, because the contract was both illegal and unenforceable. As we noted above, however, the jury also found in Anthony's favor on theories of conversion and fraud, and awarded identical damages of $3,940,949.32 on each cause of action. Anthony argues that even if we were to agree with defendants on this point, it would not alter the judgment.

Anthony is correct. The trial court found that the breach of contract claim arose out of the same nexus of facts as the conversion and fraud claims, and he was entitled to recover the total amount of damages only once. Thus, even if we were to find the contract unenforceable, the jury's verdicts as to fraud and conversion would stand, as would the judgment. We therefore need not consider this issue, and similarly dispose of Anthony's protective cross-appeal on the question of whether the trial court correctly concluded the contract was illegal. Defendants' motion to augment the record or for judicial notice to include more evidence on this point is also denied as irrelevant.

2. Affirmative Defenses

Defendants also argue that two affirmative defenses should have precluded Anthony from recovering on any cause of action, whether based upon contract or tort law. We address each in turn.

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[7] In their reply brief, defendants argue there was substantial evidence the funds really were "wages" because they were reflected on Mazon's W2. They offer no support for the argument that as a matter of law, this is sufficient to deem the funds "wages" within the meaning of Labor Code section 200. Defendants should have requested findings on these and any related factual issues *from the jury*, and the failure to do so constitutes waiver.

A. Unclean Hands

The doctrine of unclean hands must be raised in the trial court to be available as a defense. (*Marshall v. Marshall* (1965) 232 Cal.App.2d 232, 253.) Here, defendants pled the defense in their answer, but did not assert it during the trial or, as far as we can tell, request jury instructions on the doctrine. Defendants again raised it in their motion for new trial, stating that they had raised "variations" of the issue before "while addressing the issue of contract illegality." This is only arguably sufficient, given the context, but we shall err on the side of determining the issue on the merits.

"The defense of unclean hands arises from the maxim, '"'He who comes into Equity must come with clean hands.'"' [Citations.] . . . The defense is available in legal as well as equitable actions. [Citation.]" (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978 (*Kendall-Jackson*).) Unclean hands "is not a legal or technical defense to be used as a shield against a particular element of a cause of action. Rather, it is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim. It is available to protect the court from having its powers used to bring about an inequitable result in the litigation before it. [Citations.]" (*Id.* at p. 985.) It "prevents 'a wrongdoer from enjoying the fruits of his transgression.' [Citation.]" (*Id.* at p. 978.) The decision whether to apply the defense of unclean hands is a matter within the trial court's discretion. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 447.)

The focus is not on the general conduct of the parties. "The misconduct which brings the clean hands doctrine into operation must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227

Cal.App.2d 675, 728; see also *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 846 (*Mattco Forge*).)

Equity will grant relief when a plaintiff's conduct "'prejudicially affect[s] the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief.'" (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 239-240, fn. 1.) "The issue is not that the plaintiff's hands are dirty, but rather '"'that the manner of dirtying renders inequitable the assertion of such rights against the defendant.'"' [Citation.]" (*Mattco Forge, supra*, 52 Cal.App.4th at p. 846.) "The critical issues are (1) the nature of the conduct, not the party at whom it is directed, and (2) the impact that such conduct has on the *equitable relations* between the parties." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 52 (*Vacco Industries*).)

While there is no doubt here that Anthony's conduct was appalling, the issue of how that conduct impacts the "equitable relations between the parties" remains. In *Vacco Industries*, the plaintiffs, two electronics companies, sued a terminated employee, among others, for misappropriating trade secrets. (*Vacco Industries, supra*, 5 Cal.App.4th at pp. 44-45.) The defendant employee cross-complained for wrongful termination. (*Id.* at p. 45.) The jury found in the plaintiffs' favor on the trade secret claim and in the defendant's favor on the wrongful termination cross-claim, and awarded damages to each party. (*Ibid.*) The defendant employee appealed, arguing, among other things, that the doctrine of unclean hands precluded relief, based on the jury's finding of wrongful termination. (*Id.* at p. 52.)

The court disagreed. "Vacco's misconduct in terminating Van Den Berg's employment for a pretextual reason does not implicate the equities between the parties arising out of the wilful and malicious tortious misconduct alleged in plaintiffs' complaint and found by the jury to be true. The termination of Van Den Berg implicated only his contract for a term of employment and had nothing to do with his

obligation . . . to refrain from a tortious invasion of the proprietary rights of Vacco and Emerson." (*Vacco Industries, supra*, 5 Cal.App.4th at p. 53.)

The lack of impact on the equitable relations between the parties is even more stark here. Unlike the situation in *Vacco Industries*, the wrongful conduct that defendants argue should preclude Anthony's recovery was not directed at them, but at third parties. While Anthony's behavior was reprehensible, defendants' was no less so, and to preclude Anthony from recovery on the basis of an equitable defense when no equity would be served was not an abuse of discretion on the part of the trial court. We find no error.

3. Judicial Estoppel

The doctrine of judicial estoppel prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process. [Citation.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) Defendants argue that Anthony should be judicially estopped from any recovery because during his divorce proceedings, he testified that he did not receive any additional bonuses or commissions from Alliance.

Judicial estoppel may apply when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 183.) "[N]umerous decisions have made clear that judicial estoppel *is an equitable doctrine*, and its application, even where all necessary elements are present, is discretionary. [Citations.]"

(*MW Erectors v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.)

Defendants have not established that Anthony was successful in asserting the "position" that he did not receive additional compensation from Alliance. Although they argue that "Anthony was successful in asserting the first position as he was able to significantly reduce his child support payments" (underscoring omitted) they do not cite to any supporting evidence. Nor is there any evidence a court ever accepted his testimony as true. The settlement agreement between Cheri and Anthony in this case states, "The Parties resolved their marital dispute and related matters in 2002, with final judgment being entered on July 16, 2002 . . . ." During her testimony, Cheri characterized her divorce as ending in settlement.

Even if defendants had established this element, we would find no abuse of discretion. The dual purposes of the judicial estoppel doctrine are to prevent litigants from benefiting by taking dual positions and to protect litigants against the use of unfair strategies by their opponents. (*MW Erectors v. Niederhauser Ornamental & Metal Works Co., supra,* 36 Cal.4th at p. 422.) There is no evidence of benefit in this case, and any unfairness by Anthony's purported change of position did not work against defendants in this matter. We therefore find no error.

4. Punitive Damages

In addition to the compensatory damage award of approximately $6.2 million, the jury awarded $10 million in punitive damages — $7 million against Bernard Mazon, $2 million against Jane Mazon, and $1 million against Alliance. Defendants offer a number of arguments as to why the punitive award should be reversed, and unfortunately, both defendants and Anthony combine and confuse a number of legal and factual arguments. Defendants argue that the court improperly

excluded evidence that they filed bankruptcy shortly after the compensatory verdict, among other errors.[8]

With regard to issues of fact, such as whether there was sufficient evidence to support an award of punitive damages, the jury must reach that conclusion by clear and convincing evidence. We will uphold those findings on appeal if supported by substantial evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606.) The standards of review are different for the due process and evidentiary issues, but we need not reach them. Based on the lack of evidence of defendants' financial situation, the punitive damage award must be reversed.

"A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 110.) A punitive damages award is excessive if it is disproportionate to the defendant's ability to pay. *Id.* at p. 112.) The purpose for requiring some evidence of a defendant's financial condition is to allow a reviewing court to reach a reasonably informed decision, rather than having to speculate as to whether the award is appropriate or excessive. (*Ibid.)*

We agree with defendants that the evidence of their financial condition is woefully inadequate.[9] Aside from evidence Jane Mazon's salary ($50,000 per year),

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[8] We reject Anthony's argument that defendants have waived their right to appeal the punitive damages award because they did not request an instruction telling the jury that an award of damages should not exceed 10 percent of their net worth. Such an instruction would have been improper; indeed, it would contradict the instruction they were given that the amount of the punitive damage award is left to their "sound discretion." Adjustments are for the court to determine.

[9] At oral argument, Anthony's counsel noted that he had filed a motion asking that the net worth issue be deemed waived due to the Mazons' alleged failure to comply with a previous agreement regarding the production of financial documents. The motion itself is not in the record, but the reporter's transcript shows the trial court denied the motion.

which is not evidence of net worth, there was little other empirical evidence as to defendants' current financial situation.[10] Instead, Anthony chose to present his entirely self-serving testimony regarding defendants' worth. The jury heard Anthony testify that Mazon had told him that he had $20 million in a Swiss bank account,[11] and that Mazon had a condominium in Florida worth $2 million. Anthony had opined during the liability phase — without supporting evidence — that Anthony & Morgan was worth between $50 and $80 million. He also points to testimony during the liability phase as to how much revenue the business was bringing in.

Even all of this "evidence" taken together, however, fails to present the complete financial picture necessary for determining whether the award is appropriate or excessive. "Although we may surmise that the defendants' assets were in the millions, we could just as easily assume that their debts were equally high. Without evidence of the actual total financial status of the defendants, it is impossible to say that any specific award of punitive damages is appropriate." (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 58.)

This statement is equally true here. There is not only not "substantial" evidence of defendants' entire financial picture, there is simply no reliable evidence whatsoever. Not only is there no evidence at all of defendants' liabilities, there is no substantial evidence of defendants' assets, either. "Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value. [Citation.]

Anthony did not raise this issue in his cross-appeal. Thus, it is clear that Anthony had the unrelieved burden of presenting evidence of defendants' net worth.

[10] Mazon's testimony that Jane withdrew approximately $1.6 million from a Texas bank account in 2001 is not evidence of their *current* financial status at the time of trial in 2005.

[11] Mazon denies this statement.

However, '[s]ubstantial evidence . . . is not synonymous with "any" evidence.' [Citation.] Instead, the evidence must be '"substantial" proof of the essentials which the law requires.'" (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.)

The burden was on Anthony to present evidence that presented a fair picture of defendants' condition, and he failed to do so. Therefore, the punitive damage award must be reversed for lack of substantial evidence to support it.

III

DISPOSITION

The judgment is affirmed as to the award for compensatory damages and reversed as to the award for punitive damages. In the interests of "justice," so far as it may be served in this case, each party shall bear its own costs.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.